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**No. 542**

**In the Supreme Court of the United States**

**October Term, 1937**

**VITO MARONELLO, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

**ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIFTH CIRCUIT**

**BRIEF FOR THE UNITED STATES**

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# In the Supreme Court of the United States

OCTOBER TERM, 1957

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No. 549

VETO GIORDENELLO, PETITIONER

v.

UNITED STATES OF AMERICA

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIFTH CIRCUIT

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BRIEF FOR THE UNITED STATES

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## OPINION BELOW

The opinion of the Court of Appeals is reported at  
241 F. 2d 575.

## JURISDICTION

The judgment of the Court of Appeals was entered January 31, 1957 (R. 78), and a petition for rehearing was denied on May 17, 1957 (R. 79). The petition for a writ of certiorari was filed June 5, 1957, and granted on October 14, 1957 (R. 80). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

## QUESTION PRESENTED

Whether there was a valid search incident to a valid arrest.

**STATUTE AND RULES INVOLVED**

Sections 14 and 15 of Article 725-b of the Texas Penal Code (Vernon 1948), provided in pertinent part:

SEC. 14. All narcotic drugs, as herein defined, manufactured, sold, or had in possession contrary to any provision hereof, shall be, and the same are declared to be contraband, and shall be subject to seizure and confiscation by any officer or employee of the Department of Public Safety or by any peace officer who is authorized to and charged with the duty of enforcing the provisions of this Act.

SEC. 15. Officers and employees of the Department of Public Safety, and all peace officers who have authority to, and are charged with the duty of enforcing the provisions of this Act, shall have power and authority, without warrant, to enter and examine any buildings, vessels, cars, conveyances, vehicles, or other structures or places, when they have reason to believe and do believe that any or either of same contain narcotic drugs manufactured, bought, sold, shipped, or had in possession contrary to any of the provisions of this Act, or that the receptacle containing the same is falsely labeled, except when any such building, vessel, or other structure is occupied and used as a private residence, in which event a search warrant shall be procured as hereinbelow provided.

Said officers and employees of the Department of Public Safety and all peace officers who have authority to, and are charged with the duty of enforcing the provisions of this Act, shall further have power and authority, without warrant, to open and examine any box, parcel, barrel, package, or receptacle in the possession

of any person which they have reason to believe, and do believe contain narcotic drugs manufactured, bought, sold, shipped, or had in possession contrary to any of the provisions of this Act and that the receptacle containing same is falsely labeled.

Rule 3, Federal Rules of Criminal Procedure, provides in part:

The complaint is a written statement of the essential facts constituting the offense charged. \* \* \*

Rule 4 (a), Federal Rules of Criminal Procedure, provides in part:

(a) *Issuance.* If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. \* \* \*

Rule 5 (c), Federal Rules of Criminal Procedure, provides in part:

(c) *Preliminary Examination.* The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has commit-

ted it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. \* \* \*

Rule 7 (c), Federal Rules of Criminal Procedure, provides in part:

(c) *Nature and Contents.* The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. \* \* \*

#### STATEMENT

Having waived jury trial (R. 29-30), petitioner was found guilty by the United States District Court for the Southern District of Texas of unlawfully possessing heroin (R. 1, 29, 51). He admitted one previous conviction for violation of the narcotics laws, and was sentenced to eight years imprisonment and a \$25 fine (R. 53-54). On appeal, the Court of Appeals for the Fifth Circuit affirmed, Judge Rives dissenting.

The sole issue in this case is the validity of the search of petitioner's person at the time of his arrest. The evidence on this issue may be summarized as follows:

On January 26, 1956, William T. Finley, an enforcement agent for the Federal Bureau of Narcotics, obtained a warrant for the arrest of petitioner from the United States Commissioner in Houston, Texas (R. 8-9, 11-12). The warrant was based on a complaint sworn to by Finley stating, in the words of the

statute, that petitioner, on January 26, 1956, did receive, conceal, etc., narcotic drugs, to wit: heroin hydrochloride, with knowledge of unlawful importation, in violation of 21 U. S. C. 174 (R. 13). At about 8:00 p. m. on the following day, agent Finley and officer Shelton, a member of the Houston police department, arrested petitioner, on the basis of the warrant, as he emerged from a garage located in a residential area in Houston (R. 19, 31-32, 38, 43-44). The agents took a brown paper bag carried by petitioner and containing 5 ounces of heroin hydrochloride from him at the time of the arrest (R. 26, 33-35, 48-49). Agent Finley warned petitioner of his right to remain silent at the time of arrest (R. 35). Thereafter, petitioner voluntarily admitted purchasing the heroin in Chicago, adulterating it, and transporting it to Houston (R. 35-36). The indictment upon which petitioner was tried was based on the possession of this heroin (R. 1).

Petitioner was taken before a United States Commissioner the following day. He appeared with counsel, waived preliminary examination, and was arraigned on the original complaint. Petitioner did not question the validity of the warrant of arrest at that time (R. 9).

On February 29, 1956, petitioner moved to suppress the evidence obtained by Agent Finley at the time of the arrest (R. 2-3). He contended that the warrant of arrest was void and that the search incident to the arrest was therefore illegal. Petitioner's line of questioning at the hearing on the motion

indicated that the ground of the motion was that Agent Finley did not have firsthand knowledge regarding an offense by petitioner at the time the warrant was obtained (R. 15-18). Petitioner also attempted to show that the warrant, issued January 26, 1956, was used only as an excuse to conduct a search (R. 21-22).

It was shown that Agent Finley had kept petitioner under surveillance for about one month prior to the arrest. He had information, not from paid informers (R. 19), that petitioner planned to go to Chicago and return with a large supply of heroin. Petitioner made a trip, and Finley observed his return in an automobile with Illinois license plates. Furthermore, Finley had information from other law enforcement officers that the trip had been successful (R. 18, 24, 31, 34, 45). After obtaining the warrant on January 26, Finley did not see petitioner until about 6:00 p. m. on January 27, when petitioner returned to his home (R. 21). When petitioner left his home a few minutes later he was accompanied by a "well-known police character." Petitioner drove off in his car, followed "bumper-to-bumper" in a second car by this person, known to the police (R. 47). Finley and Shelton followed them, instead of arresting petitioner immediately (R. 21, 24, 47). The two cars which were being followed were driven to Lathrop Avenue in Houston where both were parked. Petitioner conferred with the other man for a few minutes. He then drove to Brownsville Street where he turned right, parked, and entered a residence (R. 24, 31, 47-48). The other man followed petitioner to

Brownsville Street, turned left one block, parked, and waited (R. 48). Some thirty minutes later, petitioner emerged from the house, went into the garage for a few seconds, and then started toward his car (R. 24, 31). As Finley and Shelton moved to intercept petitioner, they could see that he was carrying a brown paper sack or envelope in his hand (R. 33, 44). When petitioner reached the yard gateway, Finley made the arrest (R. 25). The agent testified that he had not obtained a warrant just to have an excuse to search (R. 23).

The District Court, without stating the ground for the ruling, denied the motion to suppress (R. 28).

In affirming, the majority of the Court of Appeals held that when petitioner, who was then represented by counsel, waived preliminary hearing after his arrest, he waived his right to contest the validity of the arrest and, also, of the search incident to the arrest (R. 63-64). The majority also expressed the view that the warrant of arrest was valid (R. 64-65).

#### SUMMARY OF ARGUMENT

This case involves a search only of the person incident to an arrest. Therefore, if the arrest was lawful or is not now subject to challenge, the search was also lawful, as this Court has consistently held. It is the government's position that this arrest was legal, irrespective of the validity of the warrant, under Texas narcotics law. Resolution of this issue depends upon an analysis of State law which we discuss in Point I, *infra*. We further contend that petitioner waived the alleged defect in the warrant of arrest by waiving a

preliminary hearing. See Point II. On either basis, the motion to suppress was properly denied.

# I

Possession of an insufficient warrant does not render illegal an arrest which could lawfully be made without it. Room remains to show that the arrest was otherwise valid, and we show here that the arrest was valid, apart from the warrant, under State law. (Although we did not urge this question of State law below and the Court of Appeals for the Fifth Circuit has never passed on this issue, a respondent may support the judgment of the lower court on any proper ground.)

In the absence of an applicable federal statute, the law of the state where an arrest without warrant is made determines its validity. *United States v. Di Re*, 332 U. S. 581, 589. Texas law authorizes arrests without warrant in narcotics cases where probable cause exists to believe that narcotics violations have been committed. The language of the statute speaks of searches of the person without warrant, based on probable cause, without making reference to arrests, but the Texas courts have construed the statute to authorize arrests without warrant based on probable cause.

In this case, it is immaterial whether the federal standard or the Texas standard of probable cause is applied. Under federal law, probable cause exists where the facts and circumstances within the officers' knowledge and of which they have reasonably trustworthy information, even though incompetent as evi-

dence, are sufficient to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Brinegar v. United States*, 338 U. S. 160, 175-176. In Texas, probable cause is defined as a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged. This has been construed to mean that the arresting officer must have some information that the defendant was violating the law, plus some act on the part of the defendant which bolsters and supports such belief. *Thomas v. State*, 288 S. W. 2d 791, 792-793.

At the time of this arrest, the officers had information from other law enforcement officials that petitioner was in Houston, Texas, with a large supply of narcotics which he had obtained in Chicago, Illinois, and the officers had obtained a warrant of arrest. Agent Finley had observed petitioner's return to Houston in an automobile bearing Illinois license plates. Just prior to the arrest, the officers saw petitioner take a trip in Houston with a well-known police character. Petitioner behaved as though he did not wish to be seen with this person nor seen near a certain house in Houston. When petitioner emerged from the garage on these premises, he was carrying a brown paper bag which the agents reasonably concluded probably contained narcotics which petitioner intended to deliver to his companion. They had probable cause to arrest petitioner then and there, and did so. On this basis, the arrest was authorized.

and the search its lawful incident. The fact that the arrest could have been made earlier did not render it invalid. *Scher v. United States*, 305 U. S. 251.

## II

Moreover, we believe petitioner waived his right to challenge the validity of the warrant of arrest by waiving preliminary hearing.

The question of what grounds for challenging an arrest remain open to a defendant who, with the advice of counsel, waives a preliminary hearing after that arrest, is one which has not been fully explored by the courts. Clearly, by waiving a preliminary hearing, a defendant does waive the right to assert that he cannot thereafter legally be held in custody, *United States v. Walker*, 197 F. 2d 287, 289 (C. A. 2), certiorari denied, 344 U. S. 877. He would thereby waive any question of identity, and he would waive any technical irregularity in the complaint or warrant, especially one appearing on the face of the complaint or warrant. *United States v. Ruroede*, 220 Fed. 210, 213-214 (S. D. N. Y.). This waiver would encompass such questions as relate to identity, misspelled names, and incomplete designation. The precise issue raised by this case is whether waiver of the preliminary hearing also waives questions relating to the validity of the warrant issued prior to the arrest, where the ground upon which the warrant is challenged is that the complainant, who alleged personal knowledge of the facts which gave rise to probable cause, lacked such personal knowledge. We believe that, under all the facts and circumstances of this case, this alleged defect is also waived by a waiver of a preliminary hearing.

In our view, the issue of whether probable cause exists to continue the person arrested under detention—the issue which would be raised at a preliminary hearing under Rule 5 (c) of the Federal Rules of Criminal Procedure—is, in the overwhelming majority of cases, inextricably involved in the question of whether probable cause existed to justify issuance of the warrant in the first instance. Therefore, it is not unreasonable, and makes for an orderly and expeditious disposition of this issue, to hold that the waiver of preliminary hearing waives all defects of a technical nature relating to the manner in which the accused has been brought before the Commissioner.

We note that the basis for challenge here—that the complaint alleged that it was made on personal knowledge, when in fact, it was based in part on reliable information—is one which, although not appearing on the face of the complaint, goes to the manner of arrest itself rather than to the seizure of the bag of heroin which was incident to that arrest. Thus, we are not faced with the question whether a waiver of preliminary hearing waives questions other than those relating to an arrest itself—for example, such questions as whether the search which followed the arrest went beyond permissible bounds. We urge merely that where, as here, the alleged defect goes to the arrest as such, rather than to collateral matters such as the extent of a search, the waiver of a preliminary hearing waives standing to challenge the validity of the very arrest which brought the accused before the Commissioner for that preliminary hearing. By waiving preliminary hearing, petitioner in

effect admitted through counsel that the complainant did have sufficient basis to arrest him. Petitioner should be held to that position and should not be allowed now to assert that he was illegally taken into custody.

### III

Petitioner, having waived preliminary hearing, also waived, for the reasons set forth in Point II, the objection which he now presses that the complaint is insufficient on its face. But, in any event, the complaint adequately states, in the terms of the statute, that petitioner received and concealed heroin hydrochloride, a narcotic drug, with knowledge of its unlawful importation. Since an indictment in the words of this statute is sufficient, a complaint in the same form should also be sufficient to withstand the claim that it fails sufficiently to allege the essential facts.

Under Rules 3 and 7 (c), F. R. Crim. P., both complaints and indictments or informations need set forth only "the essential facts constituting the offense charged." Both rules are concerned with steps in the initiation of prosecution, and there is no reason to suppose that the quoted phraseology is to be given different content in each rule. The allegation of the minimum facts of the offense in an indictment is sufficient; the allegation of the same facts in a complaint should also suffice.

Rule 7 (c), *supra*, does not embody the so-called "short form" of indictment used in some jurisdictions; but a short statement of the necessary facts is

enough. Since there is no indication of any intent to change the meaning of the term "essential facts" when it was used in Rule 3, *supra*, it follows that a short statement of the necessary facts in the complaint is also adequate to set forth the offense.

The "essential facts" of an indictment may be the facts of a particular violation expressed in the terms of the statute allegedly violated. If the details of the accusation are desired, a bill of particulars must be sought. *United States v. Debrow*, 346 U. S. 374, 376. If such a bill is not requested, the indictment is sufficient to withstand the later claim that it fails to allege sufficient essential facts.

A complaint drawn in terms of the statute allegedly violated should be accorded the same treatment. Petitioner is not entitled to a bill of particulars but he is entitled to a preliminary hearing, where he can learn even more of the evidentiary details than would be found in a bill of particulars. If he waives preliminary hearing, the complaint should thereafter be viewed as sufficient to withstand the claim that the essential facts were not alleged.

If the facts alleged in the complaint—that petitioner received and concealed heroin on January 26, 1956, in Houston, Texas—are taken as true, an offense is made out. No specific intent or state of mind is necessary, and no evidentiary facts giving rise to an inference of intent need be mentioned. In such a case as this, the facts and the complainant's conclusion from the facts are one and the same. Even now, petitioner cannot point out any crucial omission. Hence,

the complaint states a complete narcotics offense under 21 U. S. C. 174.

#### ARGUMENT

There is involved in this case only a search of the person incident to an arrest. It is therefore undisputed that, if the arrest was valid or is not now subject to challenge, the search must be sustained. This Court has consistently held that, given a lawful arrest, the body and clothing of the arrested person may be subjected to search, and this principle has not been disputed in any of the recent cases dealing with the precise scope of the Fourth Amendment's ban on "unreasonable searches and seizures." *Kremen v. United States*, 353 U. S. 346, 347; *United States v. Jeffers*, 342 U. S. 48, 51; *United States v. Rabinowitz*, 339 U. S. 56, 60; *Johnson v. United States*, 333 U. S. 10, 15; *Harris v. United States*, 331 U. S. 145, 150; *United States v. Di Re*, 332 U. S. 581, 587; compare Frankfurter, J., dissenting in *Davis v. United States*, 328 U. S. 582, 609-610, and in *Harris v. United States*, *supra*, at 164-165.

It is the government's position that the arrest in this case was legal, irrespective of the validity of the warrant, under Texas statutes relating to narcotics offenses. Resolution of this issue depends upon an analysis of Texas law which we discuss in Point I, *infra*. We further contend in Point II, *infra*, that petitioner waived the alleged defect in the warrant of arrest by waiving a preliminary hearing before the Commissioner. On either basis, the motion to suppress was properly denied.

## I

HAVING PROBABLE CAUSE TO BELIEVE THAT PETITIONER HAD COMMITTED A NARCOTICS OFFENSE, THE OFFICERS WERE FULLY AUTHORIZED TO ARREST HIM WITHOUT A WARRANT

We believe that petitioner was lawfully arrested and hence, that the search of his person was valid even if the warrant of arrest is disregarded.<sup>1</sup> Possession of an insufficient warrant does not render illegal an arrest which could lawfully be made without it. *United States v. Rabinowitz*, 339 U. S. 56, 60; *Go-Bart Importing Co., et al. v. United States*, 282 U. S. 344, 356; *Stallings v. Splain*, 253 U. S. 339, 342. Room remains to show that the arrest was otherwise valid. We submit that the officers had authority under State law to arrest without a warrant for narcotics offenses, on probable cause to believe that the offenses had been committed; and we also submit that the officers here did in fact have probable cause for the arrest.

A. TEXAS LAW PERMITS ARRESTS FOR NARCOTIC VIOLATIONS, WITHOUT WARRANT, ON PROBABLE CAUSE

This Court has held that “\* \* \* in absence of an applicable federal statute the law of the State where an arrest without warrant takes place determines its validity”, *United States v. Di Re, supra*, 332 U. S. at 589; *Johnson v. United States, supra*, 333 U. S. at 15.

<sup>1</sup> The decision of the Court of Appeals was not put on this ground. A respondent may, however, support the judgment below on any proper ground even if it was not the basis of the ruling of the lower court and even if it was not argued by the respondent below. *Langnes v. Green*, 282 U. S. 531, 535-539; *Walling v. General Industries Co.*, 330 U. S. 545, 547; *United States v. Ballard*, 322 U. S. 78, 88.

At the time of the government's brief in opposition to the petition for a writ of certiorari, it was believed that the arrest here was governed by general Texas law that an arrest without a warrant is authorized only "upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape." Code of Criminal Procedure, Vernon's Annotated Texas Statutes, Article 215. Further research since the grant of certiorari has, however, disclosed that there are Texas statutes, cited *supra*, pp 2-3, relating specifically to narcotics offenses,<sup>2</sup> and that these statutes have been interpreted by Texas courts as authorizing arrest without a warrant on probable cause to believe that narcotics violations have been committed.<sup>3</sup> On the basis of Texas law, which we discuss below, we submit that the arrest was lawful without regard to the validity of the warrant.

Section 14 of Article 725-b of the Texas Penal Code, quoted *supra*, p. 2, declares all narcotic drugs, including heroin (Section 1 (12), Article 725-b), to be contraband. Section 15, quoted *supra*, pp. 2-3, provides that peace officers shall have the "power and au-

<sup>2</sup> There are specific statutes in other fields as well. See, for example, Texas Code of Criminal Procedure, Vernon's Annotated Texas Statutes, Article 325 (arrest of thief without warrant on probable cause and seizure of stolen property), and Texas Penal Code, Article 487 (arrest without warrant on probable cause for violations involving firearms).

<sup>3</sup> It should be noted that under present federal law, 26 U. S. C., Supp. IV, 7607, added July 18, 1956, the arrest in this case would have been valid, without regard to the validity of the warrant, since a narcotic agent is given authority to make arrests where he "has reasonable grounds to believe that the person to be arrested has committed" a narcotics offense.

thority, without warrant, to open and examine any box, parcel, package or receptacle *in the possession of any person* which they have reason to believe, and do believe contain narcotic drugs \* \* \* \* (Emphasis added.)

The Texas courts have put a gloss of construction on this statute, reading it so as to authorize arrests without warrant on probable cause, as well as searches without warrant on probable cause. *Giacona v. State*, 298 S. W. 2d 587, 588-589; *Thomas v. State*, 288 S. W. 2d 791, 792; *Palacio v. State*, 283 S. W. 2d 765; *Gonzales v. State*, 160 Tex. Crim. 548, 272 S. W. 2d 524, 525, overruled on other grounds by *Thomas v. State*, *supra*, at 793. While the language of the statute speaks of searches without warrant, including searches of the person—and a statute may authorize a search without a warrant, based on probable cause, independent of any power to arrest—the Texas court in *Thomas v. State*, 288 S. W. 2d 791, 792, clearly implied that every search of the person without a warrant must be incidental to a legal arrest. See, also, *Giacona v. State*, *supra*, 298 S. W. 2d 587, 588-589; and Note, 35 Texas L. R. 270, 271. The net effect of the Texas statutes, as interpreted by the Texas courts, as we read those decisions, is that officers are authorized to arrest, without a warrant, on

\* Members of the Houston police department are peace officers with authority to enforce the narcotics statutes. *French v. State*, 284 S. W. 2d 359, 360.

\* *Carroll v. United States*, 267 U. S. 132, 158; *Odenthal v. State*, 106 Tex. Crim. 1, 9, 290 S. W. 743, 746; *Battle v. State*, 105 Tex. Crim. 568, 570, 290 S. W. 762, 763.

probable cause to believe that a narcotics offense has been committed.

Here, the officers had not only probable cause to believe that petitioner had committed a narcotics offense, but had reason to believe that petitioner then and there had narcotics on his person (see *infra*, pp. 21-22). Thus, under Texas law, the Texas officer and the federal officer (whose right to arrest depended on state law) had the power to make an arrest for narcotics violations without a warrant.

B. SINCE THE OFFICERS HAD TRUSTWORTHY INFORMATION THAT PETITIONER POSSESSED A LARGE SUPPLY OF NARCOTICS AND PETITIONERS SUSPICIOUS ACTIONS PRIOR TO ARREST CORROBORATED THEIR INFORMATION, THE OFFICERS HAD PROBABLE CAUSE TO ARREST PETITIONER FOR NARCOTICS VIOLATIONS

Whether the standard of probable cause be as defined in the federal or the Texas cases, there was probable cause for the arrest and search of petitioner.

In *Brinegar v. United States*, 338 U. S. 160, 175-176, this Court defined probable cause as follows:

Probable cause exists where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed \* \* \*. [Emphasis added.]

The Court rejected (338 U. S. at 174, n. 13) the earlier dictum of *Grau v. United States*, 287 U. S. 124, 128, to the effect that the facts giving rise to probable cause must be evidence which is competent to convict, and disapproved of the proposition that proof of probable

cause in any given case depends upon fixed immutable requirements, saying (338 U. S. at 175):

In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.

and, at 176:

These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because in many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. *The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests* \* \* \* [Emphasis added.]

\* See also, *Carroll v. United States*, 267 U. S. 132, 161, where the Court quoted with approval the following passage from *Commonwealth v. Carey*, 12 Cush. 246, 251, " \* \* \* but if he suspects one on his own knowledge of facts, or on facts communicated to him by others, and thereupon he has reasonable ground to believe that the accused has been guilty of felony, the arrest is not unlawful." (Emphasis added.)

*Brinegar* thus put aside any rigid or formulary test of probable cause. The Court conditioned a finding of probable cause simply upon the nontechnical consideration of whether the facts would lead reasonable men sensibly to their conclusions of probability." And the *reliability* of these facts was made the critical question, not whether the information would be admissible in a judicial proceeding. See, also, *Husty v. United States*, 282 U. S. 694, 700-701; *United States v. Sebo*, 101 F. 2d 889, 890 (C. A. 7).<sup>7</sup>

Texas law defines probable cause as:

A reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged. [*Landa v. Obert*, 45 Tex. 539, as quoted in *Thomas v. State*, *supra*, 288 S. W. 2d 791, 792 (Tex.).]

<sup>7</sup> Cf. *Costello v. United States*, 350 U. S. 359, in which this Court affirmed a conviction, deriving from an indictment valid on its face, but which was returned by the grand jury solely on hearsay evidence. If hearsay evidence may support an indictment which results in trial and conviction, it follows that *reliable* hearsay (cf. Mr. Justice Burton, concurring, at 350 U. S. 359, 364-365), may constitute probable cause to make an arrest. See *King v. United States*, 1 F. 2d 931 (C. A. 9); *United States v. Heitner*, 149 F. 2d 105, 106 (C. A. 2), certiorari denied, *sub nom. Cryne v. United States*, 326 U. S. 727; *United States v. Li Fat Tong*, 152 F. 2d 650 (C. A. 2); *Mueller v. Powell*, 203 F. 2d 797 (C. A. 8); *Cannon, et al. v. United States*, 158 F. 2d 952 (C. A. 5), certiorari denied, 330 U. S. 839; *United States v. Walker*, 246 F. 2d 519, 527-528 (C. A. 7); *Browner v. United States*, 215 F. 2d 753, 754 (C. A. 6); *Somer v. United States*, 138 F. 2d 790, 791 (C. A. 2).

This is no less rigorous a standard in phraseology than that forged by this Court in *Brinegar v. United States*, 338 U. S. 160, 175-176, and, in its application, the Texas standard is rather more rigorous. Thus, in Texas, " \* \* \* the [arresting] officer [must] have some information that the accused was violating the law *plus* some act on the part of an accused which would bolster and support such belief." *Thomas v. State*, *supra*, at 793. Here, the officers did have credible information that petitioner was in possession of narcotics and his suspicious actions, which they observed just prior to the arrest, lent support to their belief that he was violating the law.

Agent Finley had been informed by other law enforcement officials that petitioner was in Houston with a large quantity of heroin, and that petitioner had planned to and did go to Chicago, Illinois, to obtain the narcotics. Furthermore, Finley had personally observed petitioner's return to Houston in an automobile bearing Illinois license plates. When Finley and Shelton took up their surveillance on January 27, 1956, they saw the petitioner return to his home. In a few minutes, petitioner emerged in the company of a "character" well known to the Houston police. The two men drove off in two cars, yet they were obviously travelling together for the cars proceeded bumper-to-bumper. After driving to a residential area of Houston, petitioner and his friend stopped and conferred for a few minutes. Petitioner then drove to a Brownsville Street address, parked, and entered a house. The friend parked across the street

about 1½ blocks away from this residence and waited.\* After petitioner emerged from the house and its garage, Finley and Shelton could see that he was carrying a brown paper bag or envelope and was about to depart in his car.

When all that the officers had observed is coupled with their information that petitioner had just returned to Houston with a large supply of heroin, they could reasonably conclude that petitioner and his associate did not want to be seen at or in front of the Brownsville Street address because their trip was not an innocent one; that they planned a narcotics transaction; that the Brownsville address was the hiding place of petitioner's cache of narcotics; and that petitioner, at the moment of arrest, was about to deliver a supply of heroin. Small quantities of narcotics are usually held for personal use, large quantities for sale; the officers had information that petitioner was concealing a large quantity.

Finley and Shelton were not required to separate each particular fact from its context and discover its individual significance. Each fact was not isolated, and reasonable minds would not evaluate the facts separately. Therefore, even though some of the facts, standing alone, might be consistent with petitioner's innocence of any wrongdoing, what is important is that petitioner's actions, as observed by the agents,

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\* The evidence concerning the presence and movements of petitioner's companion is mainly to be found in the testimony of officer Shelton, who testified at the trial but not at the hearing on the motion to suppress. However, the validity of a search is to be tested by the whole of the evidence presented, both on the motion and at trial. *Carroll v. United States*, 267 U. S. 132, 162; *Rent v. United States*, 209 F. 2d 893, 896 (C. A. 5).

tended to support the information they had received that petitioner had narcotics available for disposal.

The record, of course, does not disclose the precise reasoning of each of the officers who acted together in response to the situation with which they were confronted. The crucial issue is whether the facts known to the officers justified the action which they took. The officers might have attempted to execute the warrant when petitioner first emerged from his house. But surely they were not wrong in delaying their action for a short time for the purpose of observing further the acts of petitioner, in order to get some clues as to where the suspected narcotics were hidden. Similarly, the fact that they might have wished, on valid grounds, to seize fruits of the crime, as well as to make an arrest does not render the arrest improper. They would have been entitled to search petitioner's person no matter when they arrested him, and the officers did not wait until petitioner was inside a building in order to search the building incident to an arrest. Petitioner was arrested on the street. The fact that the arrest was delayed until it was believed the fruits of the crime could be recovered does not render the action improper law enforcement.

Delaying the arrest seems fully justified in the light of *Scher v. United States*, 305 U. S. 251. There, federal officers observed defendant's actions for a period of several hours and then followed his "apparently heavily loaded" automobile for a distance of some five blocks until defendant reached his home. Defendant parked his car in a garage within the curtilage and

was arrested for violating the liquor laws as he was getting out of the automobile. The Court noted that defendant could have been stopped on the street and arrested, and held that passage of the car into the open garage did not destroy that right to arrest. When *Scher* is applied here, it would indicate that the delay in arresting petitioner, to permit further lawful investigation, did not vitiate the subsequent arrest.

The test of whether an arrest is justifiable as based on probable cause is one of reasonable deduction, not proof beyond a reasonable doubt. Here, there was probable cause for the arrest without regard to the fruits of the search. Under Texas law, as construed by the Texas courts, we submit the search was proper as incident to a lawful arrest without regard to the validity of the arrest warrant.

## II

BY WAIVING PRELIMINARY HEARING, THE PETITIONER WAIVED THE ALLEGED DEFECTS IN THE WARRANT OF ARREST

Petitioner contends that the Court of Appeals erred in holding that he waived all questions in connection with the validity of his arrest by waiving the preliminary hearing after arrest. He presses for the theory, adopted by the dissent below, that waiver of the preliminary hearing does not waive anything with respect to the legality of the arrest.

The question of what grounds for challenging an arrest remain open to a defendant who, with the advice of counsel, waives a preliminary hearing after

that arrest, is one which has not been fully explored by the courts. Clearly, by waiving a preliminary hearing, a defendant does waive the right to assert that he cannot thereafter legally be held in custody, *United States v. Walker*, 197 F. 2d 287, 289 (C. A. 2), certiorari denied, 344 U. S. 877. He would thereby waive any question of identity, and he would waive any technical irregularity in the complaint or warrant, especially one appearing on the face of the complaint or warrant. *United States v. Ruroede*, 220 Fed. 210, 213-214 (S. D. N. Y.). This waiver would encompass such questions as relate to identity, misspelled names, and incomplete designation. The precise issue raised by this case is whether waiver of the preliminary hearing also waives questions relating to the validity of the warrant issued prior to the arrest, where the ground upon which the warrant is challenged is that the complainant who alleged personal knowledge of the facts which gave rise to probable cause lacked such personal knowledge. We believe that, under all the facts and circumstances of this case, this alleged defect is also waived by a waiver of a preliminary hearing.

In our view, the issue of whether probable cause exists to continue the person arrested under detention—the issue which would be raised at a preliminary hearing under Rule 5 (c) of the Federal Rules of Criminal Procedure—is, in the overwhelming majority of cases, inextricably involved in the question whether probable cause existed to justify issuance of the warrant in the first instance. Therefore, it is not unreasonable, and makes for an orderly and expeditious dis-

position of this issue, to hold that the waiver of preliminary hearing waives all defects of a technical nature relating to the manner in which the accused has been brought before the Commissioner.

At a preliminary hearing, defendants are entitled to be represented by counsel, as was this petitioner (R. 9), and may demand that the evidence against them be brought forward. Defendants are permitted, through counsel, to cross-examine the witnesses and present evidence in their own behalf. We suggest that this is the time, at the very outset of the criminal proceeding, when defendants should raise any technical defects in the manner in which they were arrested. In many instances, the defects are of such a nature that they can be promptly corrected. In other instances, entirely new proceedings against the accused must and can be initiated. Requiring defendants to raise questions relating to the manner of their arrest at this initial stage of the criminal proceedings, if they would ever raise such questions, would not impose an undue burden upon the accused; and would enable the cases to be either dismissed—perhaps in favor of some new action—or proceed to disposition on the merits.

We note that the basis for challenge here—that the complaint alleged that it was made on personal knowledge, when, in fact, it was based in part on reliable information—is one which, although not appearing on the face of the complaint, goes to the manner of arrest itself rather than to the seizure of the bag of heroin which was incident to that arrest. Thus, we are not faced with the question whether a waiver of

preliminary hearing waives questions other than those relating to an arrest itself—for example, such questions as whether the search which followed the arrest went beyond permissible bounds.\* We urge merely that where, as here, the alleged defect goes to the arrest as such, rather than to collateral matters such as the extent of a search, the waiver of a preliminary hearing waives standing to challenge the validity of the very arrest which brought the accused before the Commissioner for that preliminary hearing.

Neither is the Court called upon in this case to determine whether waiver of a preliminary hearing would preclude a defendant from asserting that the arrest was without sufficient probable cause to meet Fourth Amendment requirements governing a search of premises incident to an arrest. Nor is there any question here whether, if the complainant did not have probable cause to request the warrant—did not have knowledge, personally or through reliable hearsay of the facts which he alleged he did know—a defendant could, after waiving preliminary hearing, challenge the arrest for the purpose of challenging the search. In this case the complainant did in fact have probable cause to believe that an offense had been committed and that petitioner had committed it. The fact that the complainant had not shown an awareness of the distinction between facts which he knew on his own observation and facts which he knew because of reliable information obtained from others is the kind of defect

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\* There was no search of any premises here: the agents merely seized the bag petitioner was carrying in his hand. (See p. 5, *supra*.)

which a defendant should challenge at the first opportunity, if he is going to challenge it at all. This type of error is the kind which lawyers have found it easy to make. See *De Hardit v. United States*, 224 F. 2d 673 (C. A. 4), certiorari denied, 350 U. S. 863. And the courts have treated this kind of error as a technical rather than a basic defect. See *Rice v. Ames*, 180 U. S. 371, 376, *United States v. Walker*, 197 F. 2d 287, 289 (C. A. 2), certiorari denied, 344 U. S. 877.

Although agent Finley acted on the basis partly of credible information and belief, rather than entirely personal knowledge, when he swore to the complaint, this is not a case where there was any overreaching. From Finley's testimony (R. 16-19) it appears that at the time of the motion to suppress he was not even aware of the distinction.

As pointed out *supra*, p. 6, Finley had information from other law enforcement officials that petitioner had a large supply of heroin on hand which he had obtained in Chicago.<sup>10</sup> Finley's earlier surveillance had confirmed a part of this information, and its source was of a sort regarded as credible by the Texas cases in other instances where probable cause was in issue. See *Hatfield v. State*, 161 Tex. Cr. 362, 276 S. W. 2d 829; *Brasselton v. State*, 112 Tex. Crim. 615, 18 S. W. 2d 168, 169. Cf. *Costello v. United States*, 350 U. S. 359-363. Hence the quality

<sup>10</sup> Narcotic drugs are subject to internal revenue tax, 26 U. S. C., Supp. IV, 4701, and Finley therefore was a revenue agent. 5 U. S. C. 281c, 282a; see *United States v. Jones*, 204 F. 2d 745, 752-753 (C. A. 7), certiorari denied, 346 U. S. 854. Hence, the warrant of arrest could issue without the approval of a United States Attorney. 18 U. S. C. 3045.

of the information believed by the officers upon which they acted is not open to question. If petitioner through his counsel had chosen at the preliminary hearing to raise an issue as to the sufficiency of Finley's knowledge, Finley could have shown probable cause for the complaint. Finley could then have been called upon to spell out the details which petitioner complains are missing from the complaint, to specify what was personal knowledge and what was knowledge based on information from others. By waiving preliminary hearing, petitioner in effect admitted through counsel that Finley did have sufficient basis to arrest him. Petitioner should be held, for the purposes of this case and for the reasons stated above, to that position. He should not be allowed now to assert that he was illegally taken into custody.

### III

#### THE COMPLAINT ADEQUATELY STATES THE ESSENTIAL FACTS OF THE OFFENSE

The dissenting judge below thought, and petitioner argues here, that, regardless of "probable cause", the complaint was deficient in that it did not meet the requirement of Rule 3, F. R. Crim. P., that the complaint must contain "the essential facts constituting the offense charged". This is a challenge to the sufficiency of the complaint for failure to allege sufficient detail and we think is in the same category as a misspelled name or other technical defect appearing on the face of the complaint. For the reasons set forth in Point II above, we think such an alleged defect was waived by waiver of preliminary hearing.

The argument is, in any event, without merit. The complaint sufficiently states, in the terms of the statute, that petitioner received and concealed heroin hydrochloride, a narcotic drug, with knowledge of its unlawful importation. See 21 U. S. C. 174. Since an indictment in the words of this statute is sufficient (*Brown v. United States*, 222 F. 2d 293, 295-296 (C. A. 9); *United States v. Rodgers*, 218 F. 2d 536, 537-538 (C. A. 5); *Aeby v. United States*, 206 F. 2d 296, 297-298 (C. A. 5), certiorari denied, 346 U. S. 885; *Pon Wing Quong v. United States*, 111 F. 2d 751, 754-755 (C. A. 9); see *United States v. Valdes*, 229 F. 2d 145, 147 (C. A. 2), certiorari denied, 350 U. S. 996), a complaint in the same form should also be sufficient. *United States v. Walker*, *supra*, 197 F. 2d 287, 289.

Rule 3, F. R. Crim. P., defines a complaint as "a written statement of the essential facts constituting the offense charged." Similarly, Rule 7 (c), F. R. Crim. P., provides that "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." The illustrative forms which accompany the Rules make it clear that an allegation of the minimum facts of the offense states enough "essential facts" to set forth an offense in an indictment or information.<sup>11</sup>

<sup>11</sup> See F. R. Crim. P., App. of Forms. For example, a violation of 26 U. S. C., Supp. IV, 5176, which requires the bonding of distillers before operations begin or are continued, is alleged by the statement that defendant "carried on the business of a distiller without having given bond as required by law", even though the facts giving rise to the characterization of "busi-

We do not say it is enough, in either a complaint or an indictment, merely to name the offense allegedly committed. A contemporary interpretation of Rule 7 (c), *supra*, was given by Mr., now Judge, Alexander Holtzoff, who served as secretary of the Advisory Committee on Federal Rules of Criminal Procedure. In speaking of this rule he said (Holtzoff, *Reform of Federal Criminal Procedure*, 12 Geo. Wash. L. R. 119, 125-126):

The form adopted by the Committee is not what is technically known as the short form indictment, which merely names the crime with which the defendant is charged, by its legal term, without specifying or summarizing the facts of the offense. The Committee deliberately rejected indictments of this type, because they are apt to evoke motions for bills of particulars and thereby constitute a source of unnecessary delay. A simple indictment, briefly and succinctly setting forth the facts of the specific crime, seems far preferable.

It follows that the "essential facts" requirement of Rule 7 (c), *supra*, demands more than a mere characterization of the offense committed. It means that a short statement of the necessary facts must be set forth. Hence, to ascribe the same meaning to the "essential facts" requirement of Rule 3, *supra*, does no violence to the older concept that a complaint should fairly state the substance of the offense charged to justify issuance of a warrant. See *Ex parte Van Hoven*, Fed. Cas. No. 16,858 (C. C. D. Minn.).

ness" and "distiller" are not spelled out. See Form 5, App. of Forms, *supra*.

There is no reason to suppose that the words "essential facts" used in both Rules 3 and 7 (c) are to be given different content in each rule, especially since both rules are concerned with steps in the initiation of prosecution. Indeed, there is a general principle that a word used in several places in a single piece of legislation—even though it could encompass diverse concepts—should be given but one meaning throughout, unless the context clearly requires that several meanings be implied. *National Mutual Insurance Co. v. Tidewater Transfer Co., Inc.*, 337 U. S. 582, 587; *United States v. Cooper Corporation et al.*, 312 U. S. 600, 607; *Helvering v. Stockholms Enskilda Bank*, 293 U. S. 84, 87; *Atlantic Cleaners & Dyers v. United States*, 286 U. S. 427, 433. Here, the different settings in which the phrase "essential facts" appears does not require that a change in meaning be accorded it, and none of the members of the Advisory Committee on Federal Rules of Criminal Procedure who have published their views have expressed an awareness of any intent to require a shift in purport. See, for example, Holtzoff, *Reform of Federal Criminal Procedure*, *supra*; Orfield, *The Federal Rules of Criminal Procedure*, 26 Neb. L. R. 570, 574, 580; Robinson, *The Proposed Federal Rules of Criminal Procedure*, 27 J. Am. Jud. S. 38, 45; Waite, *The Proposed Federal Rules of Criminal Procedure*, 27 J. Am. Jud. S. 101, 103; and Medalie, *Federal Rules of Criminal Procedure*, 4 Lawyers' Guild Rev. (3) 1, 3.

The view of the dissenting judge below that a complaint should be more specific than an indictment because an indictment may be supplemented by a bill of

particulars ignores the fact that Rule 7 requires that the indictment itself state the "essential facts", just as Rule 3 requires that the complaint state the "essential facts". And the requirement that an indictment state the elements of the offense is quite apart from the right to learn the details of the accusation by obtaining a bill of particulars. *United States v. Debrow*, 346 U. S. 374, 376; *Hagner v. United States*, 285 U. S. 427, 431. If an indictment framed in terms of the narcotics statute is sufficient, it must be on the basis that the terms of the statute state an offense. Hence the "essential facts" of an indictment may be the facts of a particular violation expressed in the terms of the statute violated. *United States v. Debrow*, *supra*; *United States v. Smith*, 232 F. 2d 570, 572 (C. A. 3); *United States v. Williams*, 203 F. 2d 572, 573-574 (C. A. 5), certiorari denied, 346 U. S. 822.<sup>12</sup> Under Rule 7 the defendant is entitled to learn the particulars by appropriate motion, but this is separate and apart from the requirement that the indictment state an offense—that it state the essential facts. In the case of a complaint the defendant is not entitled to a bill of particulars but he is entitled to a preliminary hearing. At that time he can insist that evidence against him be presented, Rule 5 (c), F. R. Crim. P., and in that fashion learn even more of the evidentiary details than he can learn from a bill of

<sup>12</sup> For example, the "essential facts" of an indictment for first degree murder of a Federal officer are that, on or about a certain date in a certain District, defendant with premeditation and by means of shooting, murdered ~~and~~ who was a Federal officer engaged in the performance of his duties, Form 1, *supra*, F. R. Crim. P., App. of Forms.

particulars. Once again, however, this right is separate from the requirement that the complaint state the essential facts, that it state an offense. The right to a hearing is provided for by a different rule and serves different purposes.

The view that we urge is peculiarly appropriate when applied to a narcotics case such as this. The offense is essentially a simple one. Mere possession is *prima facie* a violation of the statute. See *Casey v. United States*, 276 U. S. 413. If the facts alleged in the complaint, that petitioner received and concealed heroin on January 26, 1956, at Houston, Texas, are taken as true, then—without elaboration—an offense is made out. Unlike other criminal offenses, no specific intent or state of mind is required, hence there was no need to spell out facts tending to give rise to an inference of intent. At least in a narcotics case, the distinction which petitioner seeks to draw between the facts and the complainant's conclusion from the facts (Pet. Br. 13) has little utility. They are the one and the same. An information couched in terms of the statute would not be bad as pleading mere conclusions, *Myers v. United States*, 15 F. 2d 977, 979 (C. A. 8). A complaint so phrased should also be deemed sufficient.

It is noteworthy that petitioner did not assert that the complaint was inadequate to allege the essential facts until after trial, when he filed his motion for a new trial (R. 55). His motion to suppress was put on the general theory that the complaint was insufficient, but the entire thrust of his showing on the pre-trial motion went to the issue of probable cause,

not to the adequacy of allegation in the complaint. Even now he is unable to point out any crucial omission. The fact is, we submit, that a statement that petitioner was receiving and concealing heroin was a complete statement of a narcotics offense under 21 U. S. C. 174.

#### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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